IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

Appellant,

vs.

DAVENPORT INDEPENDENT TELEPHONE COMPANY,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Brief of Appellee

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McKEE PRINTING CO., SPOKANE.

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The brief of appellant is involved and confusing, as if it was the purpose to muddy the waters rather than to present clearly and perspicuously the ques-

tions involved. This imposes on the appellee the necessity of treating the case independently and presenting it much the same as it was presented in the District Court.

The case involves a contract for the sale of a telephone plant and system, consisting of approximately three hundred miles of telephone wires, strung on poles in Lincoln County and Spokane County, Washington, reaching and serving the residents of said counties, together with a local exchange at Davenport in Lincoln County, and with storage batteries, motor generating set, battery switch boards, harmonic converters, and the usual equipment of such a system, and also a large amount of supplies of various kinds necessary to be kept for such a system. The contract was wholly in writing and consisted of a letter from the appellant offering to purchase, a letter from the appellee accepting the offer, an appraisement of the reproduction value of the physical properties made by the appraisers appointed for that purpose by each party, under and in accordance with the terms of the letter of appellant making the offer of purchase. These letters and the appraisement made thereunder are set out in the bill of complaint and admitted in the answer. The only material matter of fact in the complaint put in issue by the answer is that of ownership on the part of the appellee and its ability to make to appellant a good marketable title to the properties. The answer sets up various affirmative defences which will be noticed in their order, but which do not call for comment at this time.

The questions presented on the bill of complaint and answer and the testimony, and which the appellee must sustain affirmatively, are:

First. Was the contract sufficiently certain to warrant specific performance?

Second. Do the proofs show the ability of appellee to make a good marketable title?

Third. Is the case one for specific performance under the principles governing the equity jurisdiction of the Federal Courts?

We address ourselves to these questions before discussing those devolving affirmatively on the appellant.

ARGUMENT.

First. Was the contract sufficiently certain to warrant specific performance?

The contract was assailed for uncertainty in the District Court on almost every imaginable ground, as well as that it constituted no contract, that it was without consideration, and that it was insufficient and void under the statute of frauds. The appellant has abandoned these contentions in this court, and plants itself on the single proposition that the contract is uncertain in that it does not specify whether all or only a portion of the property of the appellee was to be conveyed, and if only a portion, what particular portion.

The ingenious argument advanced by appellant on

this point, and the authorities cited which we do not controvert, falls to the ground when looked at in connection with the offer of purchase made by the appellant. That offer was in these words:

> "In the event that the Davenport Company desires to sell its property to the Pacific Company and so notifies the Pacific Company in writing within sixty days from this date, an appraisement shall be made of the reproduction value, new, of the property of the Davenport Company by you, representing the Davenport Company, and by one of our engineers, representing this company, and in the event of your failure to agree with our representative, the value to be fixed by a third person selected by you and our engineer, and the Pacific Company will thereupon pay the amount so fixed, and the Davenport Company will thereupon convey to the Pacific Company that portion of its property which the Pacific Company may lawfully acquire, the title to such property to be acceptable to the attorneys for this company."

The offer was for all the properties of the appellee, at a price to be fixed by appraisers, but to be fully complied with by the conveyance of such portion thereof as the appellant might lawfully acquire. Now, where is the uncertainty? The matter was not left open to further parley between the parties because the appellee had agreed to convey all its property. It was not a matter to be determined by the preconceived view of attorneys on either side, as suggested by appellant, because the legal rights of suitors are not foreclosed in that manner. Clearly it was a matter for the determination of the appellant alone. It could take all the properties if it thought such a purchase in-

nocuous to the law. If it doubted its right to purchase all, it could take any part that it conceived it had a right to take. Can it be said that there is any uncertainty in a contract of purchase which gives the right to purchase, for a certain specified sum, all of a specified list of properties or such part thereof as the vendee may choose to take? Such a contract simply confers an election on the purchaser to be exercised by him at his option. Absolutely no will was to be consulted under this contract, but that of the appellant. The contract stood for all or a part, as the appellant itself might determine. Whether a court of equity will refuse to decree the specific performance of such a contract on other grounds is another question, to be considered later; but that the contract is uncertain, cannot, we submit, be successfully maintained.

But the contract must not only be certain to the apprehension of the parties, but it must be so certain and definite in its terms that the court, on the refusal of either party to comply, may make an intelligent decree for its performance.

Does this contract possess that decree of certainty? If the appellant had been the actor and had come into court for a specific performance, alleging either that it might lawfully acquire the whole of the property, or that it might lawfully acquire a part thereof, and praying specific performance in whole or in part as the case might be, it could not have been said that there was such uncertainty as to what it had agreed to do, or what the appellee had agreed to do, that specific

performance would have to be denied. The appellant had agreed to pay the reproduction value of all the properties. The appellee had agreed to convey all or any part of the properties that the appellant might conceive it had a right to purchase, and its election on that point, we submit, could not have been contested. Manifestly if the contract is sufficiently certain for the purposes of the appellant it must be for those of the appellee. There must be mutuality.

On this bill brought by the appellee there were two courses open to the court for the determination of the property to be conveyed.

(a) It could have required the appellant to elect whether it would take all or only part of the property, as it would have been required to elect if it had been the moving party.

(b) It could go on and determine for itself whether appellant might lawfully acquire all, or only a portion, of the property, and make a decree accordingly. *Est certum est quod reddi certum potest.* The lawfulness or unlawfulness of a thing certainly ought to be capable of determination by a court of law. That is what courts are for.

Nor is it unknown to the practice in specific performance cases to refer such questions to the courts for their determination. In a case arising during the civil war, in which the question was whether the vendee should pay the purchase price in gold, or in legal tender notes, the Supreme Court of the United States said:

> "The defendant, it is true, insisted upon his right to payment in gold, but before the expira-

tion of the period prescribed for the completion of the purchase, he left the city of Washington, and thus cut off the possibility of any other tender than the one made within that period. In the presence of this difficulty, respecting the mode of payment, which could not be obviated, by reason of the absence of the defendant, the complainant filed his bill, in which he states the question which had arisen between them, and invokes the aid of the court in the matter, offering specifically to perform the contract on his part according to its true intent and meaning. He thus placed himself promptly and fairly before the court, expressing a willingness to do whatever it should adjudge he ought in equity and conscience to do in the execution of the contract.

"Nothing further could have been reasonably required of him under the circumstances, even if we should assume that the act of Congress, making the notes of the United States a legal tender, does not apply to debts created before its passage, or, if applicable to such debts, is, to that extent, unconstitutional and void.

"In the case of Chesterman vs. Mann (9 Hare, 212), it was held by the Court of Chancery of England, that where an underlessee had a covenant for the renewal of his lease, upon paying to his lessor a fair proportion of the fines and expenses to which the lessor might be subjected in obtaining a renewal of his own term from the superior landlord, and of any increased rent upon such renewal, and there was a difference between the parties as to the amount to be paid by the underlessee, he might apply for a specific performance of the covenant, and submit to the court the amount to be paid. So here in this case, the complainant applies for a specific performance, and submits the amount to be paid by him to the judgment of the court."

Willard vs. Tayloe, 8 Wallace, 557, at 569 & 570.

The court in this case took the view that it was lawful for the appellant to acquire all the properties, and hence it was unnecessary to resort to the first alternative suggested, namely, that of election. We will deal with that phase of the controversy later in this brief, but we submit, that the peculiar limitation put into its offer of purchase by the appellant, being a limitation capable of definite ascertainment, was not such as to render the contract unenforceable in an action for specific performance. Vagueness and obscurity resulting from the use of general expressions are, as stated by Mr. Pomeroy, obviated by the legal implications. (Pomeroy on Contract, Specific Performance, Section 161).

The contract is sufficiently certain if it be as full and definite in its description of the property as the description required in a deed of conveyance. Pomeroy on Contracts (Specific Performance), section 136.

A description in a deed in the following words: "One half of my lot" was held to be sufficient when aided by proof that the grantor owned but one lot. *Lick vs. O'Donnell,* 3 Cal. 59.

"All lands and real estate belonging to the said party of the first part, wherever situated," was held a sufficient description in another case. *Pettigrew vs. Dobbelaar,* 63 Cal. 396.

It may conduce to clearness to explain at this time the reason for the limitation placed by appellant on

its offer of purchase. It was a large owner and operator of telephone lines on the Pacific coast. It had already gotten into difficulties with the Government by reason of its efforts to purchase and combine telephone systems engaged in interstate business. The bulk of lines of the appellee consisted of local lines, engaged in a strictly intrastate business, radiating out of Davenport, in Lincoln County, and not extending beyond the borders of that county. With respect to those local lines the appellant had no lines that came into competition, but it had a line from Spokane to Davenport, which interchanged business with still another local system in Lincoln County under an agreement revocable by appellant at pleasure. The appellee also had a toll line forty miles long extending from Davenport to Spokane, and connecting with the Home Exchange in Spokane. To the extent that this latter line did an interstate business, the appellant, if it was honest in its offer of purchase, and ever intended to carry it out, may have thought that that particular part of appellee's line was an interstate competitor with it, and that it had no right to purchase that particular part of appellee's lines. Hence the offer of the reproduction value of the entire system for such portion thereof as the appellant might lawfully acquire. The toll line of the appellee, constituting only about one-eighth of all its lines, and the purchase price being based on reproduction cost, and including nothing for franchises, good will, etc., the proposition may very well have appealed to the purchaser, even if it found it could not

receive the line of the appellee extending from Davenport to Spokane. The bill of complaint and answer, and the testimony, aided by public and notorious facts of which the Court will take judicial notice, bear out this statement and the conclusions drawn therefrom.

Second. Do the proofs show the ability of the appellee to make a good marketable title?

On this point we desire to make this preliminary observation: The contract was one for the purchase of a public utility system. The offer was to purchase it as it stood. The parties must have contemplated necessarily that the property and property rights, including franchises, would be found in varying states of perfection as to title, and that they should be taken by the purchaser in the condition in which the seller then held them. It is impossible to apply to such a transaction the strict rules as to marketable title held with respect to sales of real estate. In such a transaction, unless there be warranties or guaranties or specific representations, none of which are shown here, the purchaser takes the property *cum onere.* We have found no authority on this point but the proposition is so reasonable, and so necessary if a sale of such a property is ever to be consummated, that it must be the law. The stipulation as to title in such a case is not broken by every little defect or imperfection that may appear, or even by grave defects, if it be shown that the vendor was in possession of the system and operating it under a claim

of right, and under a title which, if not perfect, was yet sufficient to protect the purchaser from any reasonable probability of attack from third persons. For this purpose time and circumstances, limitation and estopple, all ought to be considered. We make these observations, not that the protection of the principle suggested is necessary in this case, but in order that the investigation may be entered on with the proper view point of what in our opinion constitutes a marketable title in such a case.

Proceeding now to the question of title, the record shows that a part of the telephone system was acquired by grantors of the appellee by purchase at a sale conducted under an order of sale issued by the Superior Court of Spokane County in the foreclosure suit of the Washington Trust Company against the Local and Long Distance Telephone Company. The Local and Long Distance Telephone Company was the owner of the properties, but had incumbered them by a mortgage to secure an issue of bonds. When the latter company first fell into difficulties a creditors suit was brought against it in the Superior Court of Lincoln County, a receiver was appointed, and ultimately a sale of the interest of the Local and Long Distance Company was had in that suit, at which sale one H. H. Reynolds purchased the properties. The Washington Trust Company was not a party to that suit and its rights under the mortgage made to it were not affected. When, however, it brought its foreclosure suit it

made H. H. Reynolds a party, alleging that he claimed some interest in the property. Reynolds, it appears, was never served with process in the foreclosure suit, but the court in the latter suit went on and adjudicated his rights, holding that his purchase was subject to the mortgage and decreeing that he be foreclosed of any interest in the property. It is insisted that this state of facts shows such a defect as to make the title not marketable. There are two answers to this contention.

(a) It is manifest that Reynolds' purchase at the Receiver's sale, gave him no rights as against the mortgagee under the prior mortgage. The appellee being in possession under a sale enforcing that mortgage, Reynolds could never contest its title without coming into court and doing equity, which would require him to pay off the mortgage amounting to a very large sum. If we are not mistaken the record shows the sum to have been two hundred thousand dollars. So if the matter stood as the record in the Superior Court of Spokane County left it, the objection to the title urged is fanciful and chimerical and such as a court of equity ought not to listen to in this case. We insist again that the rule as to what constitutes a marketable title in the case of real estate sales cannot be applied to such a case as this.

(b) In the foreclosure suit the Washington Consolidated Telephone & Telegraph Company was also made a party, with an allegation that it claimed some

interest in the property, and the decree in that suit foreclosed whatever interest it had. The record in this case shows that whatever interest Reynolds acquired at the Receiver's sale, he had conveyed to the Washington Consolidated Telephone and Telegraph Company by bill of sale dated May 8, 1911, more than a year before the decree in the foreclosure suit. (See Plaintiff's Exhibit 4). So that it is shown in this case that Reynolds had no interest in the property at the time of the foreclosure, and that his grantee, to whom he had conveyed his interest, was a party to the foreclosure, regularly served, and that it was duly foreclosed. This ought to quiet the anxiety of the appellant, but it does not. It insists that Reynolds' bill of sale in 1911 does not negative that he was the owner of the property in 1912, at the time of the foreclosure. His purchase at the Receiver's sale was prior to the bill of sale. That purchase was the only foundation for conceiving that he had an interest in the property, and when his bill of sale shows that he parted with that interest, the presumption is, until the contrary is shown, that his status remained as the bill of sale left it. We do not consider it necessary to cite authorities to a principle of evidence so elementary.

The court in the foreclosure suit did not, as appellant insists, adjudicate that Reynolds was the owner of the property in 1912. The findings of fact, which it is well to remember, are no part of the judgment roll, simply found that he had purchased the property at

the Receiver's sale, but that he had purchased it subject to the mortgage. The extravagant claim of the appellant as to the findings of the court in the foreclosure suit will vanish into thin air, when the findings of fact are looked into. They are certified to this court as an exhibit, but unfortunately are not printed with the record, and appellee cannot in their absence quote from them on this point as it would like to do. The opinion of His Honor, Judge Rudkin, in the lower court, places this matter in its true light, as follows:

> "The court found in substance that Reynolds purchased the mortgaged property at receiver's sale; that the report of the receiver was filed and the sale confirmed on the 1st day of May, 1911; that Reynolds bought the property with full notice of the trust deed, for less than its actual value, and that his purchase was subject to the trust deed and burdened with the lien thereof. Of course it is unnecessary to say that the rights of Reynolds in the property could not be divested in this way. There was introduced in evidence at the trial, however, a bill of sale from Reynolds to the grantor in the trust deed bearing date May 8, 1911, and this bill of sale would divest him of any title acquired at the receiver's sale. It was suggested in argument that the finding above referred to was made on the 31st day of May, 1912, more than a year after the execution of the bill of sale, but the finding in favor of Reynolds, as well as the finding against him, in a proceeding to which he was not a party, must go for naught. If there is any evidence in the record that Reynolds had an interest in the property at any time, there is likewise evidence that he conveyed that interest at a later day and no evidence that he now has or claims such interest."

The only further objection urged against the title obtained at the foreclosure sale is that the franchises, which the decree ordered sold, and which the sheriff did sell and undertake to convey by his bill of sale, were not advertised in the manner required by law. That the franchises were not so advertised must be admitted, but there are several answers to the contention that that renders the appellee's title, tendered under its contract with appellant, unmarketable.

(a) Requirements as to the steps to be taken on execution sales are directory. If there is a valid execution on a valid judgment that is all the purchaser need look to. Failure to comply with the requirements is a matter between the sheriff and those injured by his failure to take proper steps.

Smith vs. Randall, 6 Cal. 50.
Blood vs. Light, 38 Cal. 302.
Frink vs. Roe, 70 Cal. 302.

Where the court has jurisdiction and power to issue execution, a sheriff's deed cannot be attacked collaterally.

Bales vs. Johnston, 23 Cal. 226.
Carley vs. Morgan (Ind.), 12 N. E. 790.
Stetson vs. Freeman, 35 Kan. 523; 11 Pac. 431.
Diamond vs. Turner, 11 Wash. 192.
Oakes vs. Williams, 107 Ill. 154.

And where the judgment debtor waits until after the right to redeem has expired, his right to move against the sale is gone.

Wiltze on Mortgage Foreclosure, Sec. 574, p. 692.
Clark vs. Glass (Ill.), 54 N. E., 368.
Leinenweber vs. Brown (Ore.), 34 Pac. 475.

(b) The record shows that the City Council of Davenport and the County Commissioners of Lincoln County, by resolution, recognized the appellee as the successor in interest to the franchises granted to the Local and Long Distance Company.

Plaintiff's Exhibit No. 3.

Plaintiff's Exhibit No. 11.

The resolution of the City Council of Davenport was submitted to Mr. Post, appellant's attorney, and pronounced satisfactory by him before its passage.

Record testimony, p. 47.

Moreover, so far as the franchise to maintain and operate lines of telephone over the county roads is concerned, that is granted by the laws of the state to any company or individual.

> "Any telegraph or telephone corporation or company, or the lessees thereof, doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street, or highway, along or across the right of way of any railroad corporation, and may erect poles, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the railroad or highway, or interrupt the navigation of the waters: Provided, that when the right of way of

> such corporation has not been acquired by or through any grant or donation from the United States, or this state, any county, city, or town therein, then the right to construct and maintain such lines shall be secured only by the exercise of the right of eminent domain, as provided by law: Provided further, that where the right of way, as herein contemplated, is within the corporate limits of any incorporated city, the consent of the city council thereof shall be first obtained before such telegraph or telephone lines can be erected thereon."

Section 9314, Remington & Ballinger's Annotated Code.

Another and later statute makes other and somewhat contradictory provisions (Section 5612, Remington & Ballinger's Code), but the later statute contains the provision: "this act shall be construed as an addition to existing laws and shall not limit powers or rights which may be exercised under existing laws."

It is manifest from the foregoing that as to the county roads, it is wholly immaterial whether the franchises were properly sold by the sheriff. On the acquisition of the physical properties the right to maintain and operate the lines attached as a matter of law, and as to the franchise to operate the local exchange in Davenport, any defect as to that was cured by the resolution of the council of that city submitted to and approved by Mr. Post.

(c) Lastly, the appellee did not agree to sell and

convey any franchises. It agreed to sell "its property," which meant its physical properties. This is shown by the stipulation that "an appraisement shall be made of the reproduction value, new, of the property," and by the conduct of the parties in making the appraisement. "It (the inventory) includes no mention of franchises, good will or other property than the property of the company. It includes only the physical property." (Testimony, A. T. West, Record p. 46).

It would be a severe rule indeed that would defeat the recovery of the appellee in this case because of some defect in the matter of franchises, not considered by either party at the time the contract was entered into, for which appellee was to receive no compensation, and which was treated as a negligible quantity by both parties in the making of the inventory and appraisement.

The remainder of the telephone system was acquired by the grantors of appellee at bankrupt sale in a proceeding of involuntary bankruptcy brought against the Washington Consolidated Telephone and Telegraph Company by three of its creditors. The brief of appellant is not clear as to the exact objection to the title acquired at the bankrupt sale. After reading the brief over repeatedly we are unable to formulate in a clear and intelligible manner the objections taken. In this dilemma we are compelled to resort to the testimony of Mr. Avery, one of the appellant's attorneys,

with respect to the objections found by him to the title. He said:

> "My objection to the bankruptcy proceedings was I thought that the stipulation of the petitioning Creditors and the alleged bankrupt that the proceedings might be dismissed prevented any further action by the Court. At that time there was no trustee. There must have been in contemplation a trustee, although the office may not have been filled. My idea of it was this, that in the first place it was competent to make a stipulation of that kind, and when they declared in the stipulation that the claim was satisfied and discharged, I thought they had a perfect right, or at least I thought it probable, that they had the right to dismiss and so stipulated, and the Court could enter no other order on the subject of stipulation; but in the event that was not true, I felt very sanguine they could not resurrect and resuscitate the case without notifying the one most interested. I do not think there is any jurisdiction, not at least without notice, after the bankrupt has stipulated to dismiss the case. After a case has gone for adjudication, it is for the benefit of the whole world, and they may come in and file claims. I think an *ex parte* order for the case to proceed could not be made without a stipulation by or notice to the bankrupt. I thought the bankruptcy case was deficient in the description of the property. I would not like to say I thought the general description of the property would render void an order of the referee in bankruptcy made at a later period, ordering the sale of all the property, but I thought it rather defective. I would not say that it would be void, but it was not at all satisfactory as a description of the title."
>
> Testimony of A. G. Avery, Record pp. 98-99.

Answering now the objections of Mr. Avery, we

submit that after an order adjudicating bankruptcy, title to the property of the bankrupt vests in the Trustee in Bankruptcy for the benefit of all creditors, and that it is not then competent for the petitioning creditors and the bankrupt to agree that the proceedings be dismissed. (Section 70 of the Bankrupt act, Federal statutes Annotated, Vol. 1, p. 697).

There can be no composition without the consent of all the creditors. (Section 11, of same act).

The stipulation for dismissal was a vain and futile thing, which did not stay the hands of the court, and it and its subordinate officers might have proceeded notwithstanding the stipulation, and without any order *ex parte* or otherwise. The bankruptcy proceeding passed regularly through its several stages to the sale of the bankrupt's property, and that was as far as the purchaser of the property was required to look. The fact that the District Judge made an *ex parte* order requiring it to proceed, after the futile effort of the parties to stop it, cannot in any way militate against the regularity of the proceedings.

The other objection of Mr. Avery we do not notice because Mr. Avery conceded that it was not vital. He said: "I would not like to say that I thought the general description of the property would render void an order of the referee in bankruptcy, but I thought it rather defective. I would not say that it was void, but it was not at all satisfactory as a description of the title."

Judge Rudkin thus disposes of all the objections to the title acquired at the bankruptcy sale:

> "On the 13th day of May, 1913, a stipulation signed by the attorneys for the petitioning creditors and the bankrupt to the effect that the proceedings should be dismissed on the ground and for the reason that the claims of the petitioning creditors had that day been fully settled and satisfied was filed. No further proceedings appear to have been taken in the bankruptcy court until an *ex parte* order was made on the 23rd day of October, 1913, directing the officers of the bankruptcy court to proceed with the administration of the estate. Attorneys for petitioning creditors in bankruptcy do not seem to realize that they have no control over the proceedings after the adjudication is made. The stipulation was never called to the attention of the Court and was wholly authorized and without force or effect. The order made in October simply required the officers of the bankruptcy court to proceed with the administration of the estate, a duty imposed by law without order or direction from the Court. There is no merit, therefore, in the claim that the Court lost jurisdiction by reason of the stipulation or otherwise. What has already been said as to the sufficiency of the description contained in the memorandum of sale disposes of the objections to the sufficiency of the descriptions in the bankruptcy proceedings. The fact that the trustee in bankruptcy repurchased the property from the purchaser at the bankruptcy sale soon after the bankruptcy sale was made does not affect the title at law or in equity, unless such repurchase was made in pursuance of an agreement entered into before the bankruptcy sale took place. The proof shows that such was not the case. I see no substantial objection, therefore, to the title acquired through the bankruptcy court."
>
> Record, pp. 34-35.

Third. Is the case one for specific performance under the principles governing the equity jurisdiction of the Federal Courts?

The equitable jurisdiction to decree specific performance depends on the same factor with respect both to lands and chattels—inadequacy of damages at law.

Pomeroy on Contract, Sec. 7, p. 8.

Inadequacy of damages is found in both cases where the subject matter of the contract is of such a special nature or of such peculiar value that damages would not be a just and reasonable substitute for specific performance.

Pomeroy on Contracts, Sections 8, 9, and 10.

As stated in Section 10:

> "The different modes of treating the two kinds of contracts does not result from any different qualities inherent in the nature of lands and chattels, but from matters incidental and collateral to the subject matter. When therefore these incidental circumstances are found in contracts relating to chattels the contract will be specifically enforced."

For specific instances see Pomeroy, Section 15 and notes.

To the same effect see Express Co. vs. Railroad Co., 99 U. S. 200.

Specific performance decreed in following cases:

Contract for water for irrigation. Colorado Land & Water Co. vs. Adams (Colo.), 37 Pac. 40.

Ships. Hurd vs. Groch (N. J. Chy.), 51 Atl. 278.

Patent rights. Telegraph Inc. Co. vs. Canadian Tel. Co. (Maine), 69 Atl. 768.

Sale of wood for Wood Pulp Mill. St. Regis Paper Co. vs. Santa Clara Lumber Co. (N. J.), 65 N. E. 968.

Clearly the vendee in this case might have had specific performance. There was only one telephone system in the world situated just like this one, and the vendee, having bargained for it, would have been entitled to the aid of a court of equity in getting it. Damages would not have been adequate. It would have been entitled to the specific thing bargained for. Now this being so, it is well settled in equity that where the vendee may have specific performance the principle of mutuality requires that the vendor have the same remedy.

Pomeroy on Contract, specific performance, section 165. Pomeroy's Equitable Remedies, Vol. 2, Section 747.

This principle prevails in the Federal Courts, notwithstanding section 723 of the Revised Statutes inhibiting suits in equity where a plain, speedy and adequate remedy may be had at law.

Cathart vs. Robinson, 5 Peters, 264.

Raymond vs. San Gabriel Land & Water Co., 53 Fed. 885.

Mr. Justice Brewer thus states the influence of that statute, in another class of cases it is true, but his language is equally applicable to specific performance:

> "Section 723 has never been regarded, however, as anything more than declaratory of the existing law, Boyce vs. Grundy, 3 Pet. 210, and as was said in N. Y. Guaranty Co. vs. Memphis Water Co., 107 U. S. 205, 210, 'was intended to emphasize the rule, and to impress it upon the attention of the courts.' It was not intended to restrict the ancient jurisdiction of court of equity, or to prohibit their exercise of a concurrent jurisdiction that had been previously upheld."
>
> *Wehrman vs. Conklin,* 155, U. S. 323.

The case of Hyer vs. Richmond Traction Company, 168 U. S. 471, cited and quoted from by appellant on this proposition, is not apposite. Neither party was entitled to specific performance in that case, under the view taken by the court, and there was no question of mutuality of remedy.

We proceed now to contentions of appellant as to which the burden, if not on it, is at least as much on it as on the appellee.

First. Discretion of the Court to decree specific performance.

From pages 38 to 43 of its brief is found a discussion of certain facts and alleged facts which it is insisted ought to move the discretion of the court to refuse specific performance.

Referring to a letter written by Mr. West to Mr. Kingsbury, to the activity of the appellant to secure the consent of the city of Spokane to a consolidation in its interest of the Bell and the Home exchanges in Spokane, and to the dual character of the proposal made by the appellant to the appellee, the brief proceeds as follows:

> "It is evident that the appellant did not desire to buy this property but that it did desire to avoid harrassment on the part of the appellee and its Mr. West, and that this letter of June 20th had direct relation to the application then pending before the city council and the matter of obtaining permission from the council and the court to consolidate the two exchanges, and that is what is referred to in Mr. West's letter wherein he says: 'You no doubt recall the circumstances under which the agreement was made and that by reason of these circumstances and the nature of the business at hand it was left largely in the nature of a gentlemen's agreement with your assurance that it would be carried out.' "

The suggestion is then made that a court of equity ought not to exercise its discretion in aid of a contract so oppressively obtained.

That Mr. West was concerned about the question of consolidation of the exchanges, inasmuch as his suburban system connected with one of them, and that he had an interest in having the permission for such consolidation made on terms that would protect his own system and others similarly situated, is no doubt true. But the conclusions drawn therefrom that the offer of purchase of his system was extorted from appellant by unfair or oppressive measures, is gratuitous and

wholly unsupported by anything in the testimony. If the facts indicate anything in the nature of covin and deceit and the high hand, they point to the appellant and not the appellee as the guilty party. It appears plain from their after conduct that they never intended to carry out the contract of purchase. Post, their attorney, with whom Mr. West conferred, and upon whose representations he largely relied before employing and consulting with an attorney of his own, told him that the papers constituted no contract on general principles of law, that there was no consideration, that there was no question but what the contract was invalid as against the anti-trust law, and intimated that he, West, was likely to get in jail if he insisted on its being carried out. (Testimony of A. T. West, Record p. 76). It was under the influence of these representations, and before he had been properly advised, that Mr. West wrote the letter to Mr. Kingsbury quoted from—a very proper letter and one that suggested how the contract might be carried out without the slightest violation of the anti-trust law, a suggestion that would have been adopted if appellant had ever purposed to carry out its offer of purchase. And finally, after all its hypocritical protestations of good faith, and its specious falling back on the laws of the government which it professed to respect but had been engaged in evading and violating for years, we find it when hauled into court practically abandoning the contention of disablement by law, and interposing every possible species of technical obstacle to the carrying out of its voluntary contract. Now, we say

that the transaction bears quite another complexion than that insisted on by the appellant. The appellant, desiring to get rid of Mr. West's just interposition in his own interest in the matter of a consolidation ordinance, made the offer to purchase his system intending thereby to neutralize his interest, and without the slightest intention of ever carrying out its offer. Fraud covin and deceit has marked its course throughout, while that of Mr. West has been marked by good faith in every particular, unless the court can say that he ought to have been deaf to the voice of the tempter and sacrificed his own interest in the larger interest of the public. We know of no principle of law that required him to do that. The appellant now finds itself hoist with its own petard, and the suggestion comes from it with a very bad grace that it be protected from the consequences of its covinous conduct by the benevolent discretion of this Court.

Another ground upon which the discretion of the Court is invoked is the decree against the appellant in the Portland suit, as to which the appellee was no party and had no knowledge other than the general knowledge of everybody that the appellant had been found guilty of lawless conduct and had been disciplined by the government; the commitment made to the Department of Justice by the appellant as the result of the exposure of its lawless conduct; and the fear that one or the other of these obligations might be violated as shown in the limitation contained in the offer of purchase that the appellant would take only

that portion of the property "which the Pacific Company may lawfully acquire." So far as the Portland decree is concerned the appellant has thus far failed to show any of its provisions that the contract with appellee violated. Moreover, that decree was in existence when appellant made the contract with appellee and it knew the terms of the decree while the appellee did not. So far as the commitments to the Attorney General are concerned, the appellee knows nothing about them and is not concerned with them. Nor is it concerned with the decree. To neither was it ever a party. The matter is only important here in one aspect. Can a party who has contracted with another, with knowledge that he has obligations to third persons, set up the fear that his contract may interfere with those obligations, as ground to move the discretion of a court of equity to refuse specific performance of the contract? Courts are moved by the inequity of contracts to refuse specific performance, and some times by change of situation for which neither party is at fault; but where is there either in this case? Where is there any inequity, except the inequity of the appellant, if it has made a contract with its eyes open which conflicts with its decretal or voluntary engagements with the government? Where is there any change of situation which should move the discretion of the court? It is almost a waste of words and an imposition on the Court to take up any time discussing the proposition. The most amazing position of all advanced by appellant in this connection, is that "it was the clear intent of this letter (the offer of pur-

chase) that the legal questions involved should be passed on by the attorneys for the appellant, and that this 'gentlemen's agreement' should not be brought into court." Inasmuch as no attempt is made to support the proposition by reason or authority we will take up no time in discussing it, but we cannot forbear an expression of commiseration for the unfortunate individual who has entered into contractual relations with this appellant and submitted his rights to be "passed on by the attorneys for the appellant."

There is one feature of the contract that calls for a word—that which obligates the appellant to pay for the whole, when it might receive only a part of the property. Concerning that, we might rely on the fact that there is no valid objection in law to the defendant receiving title to the whole of the property. But if we are mistaken about that, we submit that the feature referred to goes merely to the inadequacy of consideration, and that in the absence of an allegation of fraud and of some proof tending to show fraud, inadequacy of consideration is insufficient to move the discretion of the court to refuse specific performance. Pomeroy on Specific Performance, Sections 193, 194, 195.

In this case, moreover, the inadequacy of the consideration, if in fact there be such, was known and fully considered by appellant when it entered into the contract, and no doubt there were compensating advantages sufficient to justify it, in its own mind, in entering into the contract.

Second. Finality of attorney's opinion as to title.

To whom any opinion was given by the attorneys for appellant on the question of title is not indicated in the argument of appellant. Mr. Post told Mr. West that he had no contract and that if he had a contract it was in conflict with the anti-trust law and likely to get him in jail. We find him, however, co-operating with Mr. West to get the Davenport franchise fixed up. Mr. Avery, Mr. Post's partner, described on the witness stand what he thought were defects in the title, and was mistaken in all his conclusions, but to whom he pointed out those supposed defects as constituting an objection to the title, is nowhere disclosed. The only authoritative communication on the question of title was that made to Mr. West by Mr. G. E. McFarland, President of the Pacific Company, in the following letter:

"December 15th, 1914.

A. T. West, Esq.,
No. 530 Riverside, Spokane, Wash.

Dear Sir:—

We are in receipt of advice from Messrs. Post, Avery & Higgins to the effect that they can not approve the title to that portion of the property of the Davenport Company affected by the bankruptcy proceedings of the Washington Consolidated Company on account of the objections pointed out to you by Mr. Pillsbury at our last meeting. These defects must be cured before the title can be considered good. Further investigation on our part, even in the light of the suggestions contained in yours of the 6th inst., confirms the opinion expressed to you in Spokane, that there is no way in which the Pacific Company can lawfully acquire any portion of the prop-

erty of the Davenport- Company. Our legal department has been over the entire matter and absolutely refuses to sanction the acquisition by this Company of any property unless its right to acquire it is clear.

"Realizing, however, that you have gone to some expense in this matter, I suggest that you submit to us a statement of the expenses you have incurred, and I will then advise you what the company will do toward reimbursing you.

Yours very truly,

G. E. McFARLAND, President."

Plaintiff's Exhibit 14.

This letter must be taken as fixing whatever objections the appellant had to carrying out its contract with the appellee. On well known principles of estopple it cannot now urge any others. We find from this letter that no objection whatever was made to the title to property acquired through the foreclosure proceedings, and that as to the title to that portion acquired through the bankruptcy proceeding, the defects were not held up as vital and in themselves defeating the contract, but as something capable of being cured. "These defects," said Mr. McFarland, "must be cured before the title can be considered good." There was, then, no rejection by appellant of the title on the ground that it was not a good marketable title, and Mr. McFarland, assuming that the supposed defects in the bankruptcy title could be cured, declined to proceed with the transaction on the sole ground that his company could not lawfully acquire any portion of the property of the Davenport Com-

pany. Thereupon this suit for specific performance was brought.

This disposes of the very elaborate argument submitted by appellant on the question of the finality of the opinion of its attorneys as to title. The appellant is estopped to urge any objection to title other than those contained in the letter of its Mr. McFarland to Mr. West, and as we have seen, that was a practical admission of the sufficiency of title. "Where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such right, remedies or objections to the prejudice of the one misled."

16 Cyc. p. 805, and authorities cited.

Moot vs. Business Men's Inv. Association, 157 N. Y., 201; 52 N. E. 1.

Now on the question of the effect of the attorneys' action in rejecting title, if they ever did that, it appears conclusively that there was in fact no defect of title. Both the bankruptcy proceeding and the foreclosure suit, and the sales under them, are invulnerable to attack, and conveyed not only the physical properties but also the franchises purported to be sold. The objections of Mr. Avery to the bankruptcy proceeding were fanciful so far as they proceeded on any legal ground and capricious in so far as they assumed any impropriety on the part of the Trustee which might

render an assault on the proceeding tenable. The same is true of his objection to the foreclosure proceedings.

In view of these facts, to permit an objection of the attorneys to the title to prevail, in face of the necessary finding of the court that there was in fact a sufficient title, would be equivalent to holding that plaintiff and defendant made a contract which the defendant might avoid at its mere will and pleasure. The attorneys were not disinterested attorneys to whom the title was submitted as arbitrators. They were the attorneys of the defendant. Moreover the testimony shows that they had lent themselves to the defendant to avoid the transaction, and were astute in finding and urging objections. They told Mr. West that the letters constituted no contract; that there was no consideration, and that the contract was clearly violative of the Sherman Anti-trust law, so much so that he was liable to get in jail as the result of the transaction. Plaintiff insists that it is not the law that such a contract as that shown in this case renders the rights of the plaintiff subject to the mere ipsi dixit of the defendant or its attorneys. There are some few cases that may be found which hold that doctrine, but most of the cases cited in its support will be found to proceed on peculiarities in the language of the contract which evidence the purpose of both parties to constitute an umpire or arbitrator to pass on the title, or are so explicit in their intent to make the sale dependent on the mere discretion of the vendee or his attorneys, that the courts felt compelled to give effect to that intent.

But where the stipulation is that the title shall be acceptable to the vendee or his attorneys, the better view and that supported by the weight of authority is that it is satisfied by the tender of a good marketable title. We cite in support of that proposition:

Dean vs. Williams, 56 Wash. 614.
Wright vs. Suydam, 72 Wash. 597.
Folliard vs. Wallace, 2 Johns, 395, per ch. Kent.
Brooklyn vs. City R. R. Co., 47 N. Y. 475.
Vough vs. Williams, 120 N. Y. 255; 24 N. E. 195.
Duplex Safety Boiler Co. vs. Garden et al, 101 N. Y. 389.
Weisell vs. Mutual Life Ins. Co., 76 N. Y. 119.
Stockton Railroad Co. vs. Stockton, 51 Cal. 338.
Roberts vs. Kimmons, 65 Miss. 332.
McNeill vs. Armstrong, 81 Fed. 945.
Jay vs. Wilson, 36 N. Y. Suppl. 186.
Boyd vs. Hollowell, 62 N. W. 125.
Oakey vs. Cook (N. Y.), 7 Atl. 495.
Beardsley vs. Underhill, 37 N. J. L. 309.

The case of Church vs. Shanklin, 95 Cal. 627, which is apparently to the contrary of the above cases, proceeds on the theory that the attorneys in that case were really constituted arbitrators between the parties to pass on the title.

The latter case of Allen vs. Pockwitz, 103 Cal. 85, cited by appellant, proceeded on an option to be exercised "if title examined and accepted by the vendees' attorney," the court saying, "it is not claimed that the written agreement was for an unconditional sale." The several cases cited by appellant from Texas, Missouri, Arkansas and Virginia, will each be found to have its peculiar features, justifying the opinion ar-

rived at. Some of the cases are on options, some expressly term the lawyers selected to pass on title as arbitrators, and in some the agreement is so specific in subjecting the vendor to the whim and caprice of the vendee or his attorneys, that the courts could not well avoid giving effect to it.

If there be a substantial difference between the authorities, then we suggest that until the matter is disposed of in the Supreme Court, the Federal Courts ought in this case, as a matter of comity, to follow the rule laid down by the Supreme Court of Washington.

Third. The Sherman Anti-Trust law.

On the question of the invalidity of this contract because of its supposed conflict with the Sherman Anti-trust law, the appellant seems unwilling to plant itself on any one distinct ground, but unaccountably mixes up the Portland decree with its argument on the effect of the Anti-trust law. We have said as much about the Portland decree as we deem necessary. We knew nothing about it, are not bound by it, and if we were, there is nothing in it which prevents us from making a fair sale of our strictly intrastate telephone property.

Addressing ourselves now to the anti-trust law we say that this contract does not involve interstate commerce. It concerns a plant wholly within the state of Washington. If by contract or license that plant was sometime employed in the transmission of interstate messages, that was a mere incident, and not such as to impress the plant with an interstate character such as to forever tie the hands of the owner in the matter

of its sale and disposition. On all fours with this case is the case of Cincinnati Packet Company vs. Bay, 200 U. S. 179. In that case the sale was held to be valid notwithstanding certain interstate features of the business.

We might rely on that case as a decisive one, but need not do so. On the general construction given the Sherman Anti-trust law, the sale must be upheld.

The later and authoritative exposition of that law is to be found in the recent decisions of the Supreme Court of the United States. These embrace:—

Standard Oil Co. vs. U. S., 221 U. S. 1.
United States vs. American Tobacco Co., 55 L. Ed. (U. S. Sup. Ct.), 663.
United States vs. Union Pacific R. Co., 57 L. Ed. (U. S. Sup. Ct.), 124.
International Harvester Co. vs. State of Missouri, 58 L. Ed. (U. S. Sup. Ct.), 1276.

By this exposition the law has been freed from the hard and fast rule attached to it, or supposed to have been attached to it, by previous decisions, and every given case is now to be determined by the rule of reason; that is to say, keeping in mind the double policy of the law to promote on the one hand freedom of trade and the right of the individual to freely contract about his property and his business, and on the other hand to prevent combinations to materially restrain commerce or to effect monopoly therein, does the act called in question really and in effect and substantially, when looked at in the light of reason, effect

a restraint of interstate commerce, or tend to bring about a monopoly therein?

The original view of the act that anything which in effect restrained or injuriously effected interstate commerce was forbidden by the act, without regard to circumstances or conditions, objects or purposes, thus subjecting the business of the citizen to a procustean bed to which it must conform, was overthrown. On the other hand the statute does more than apply the common law rule concerning contracts in restraint of trade as to what are or are not reasonable. It establishes a policy, founded on modern conceptions of monopoly and wrongful and fraudulent restraints of trade, by which every act influencing interstate commerce is to be measured. The right to freely buy and sell and to conduct one's business as one's interest may dictate, is not restrained, however, where the purpose is honest and promotive of the business, by an incidental, remote or partial, or insignificant effect on interstate commerce. The intent of the parties is not material if the clear and well understood effect of their action is seriously and substantially violative of the statute, but if the effect on interstate commerce is only incidental or remote, or partial, and the action is promotive of the business, and such as is within the ordinary contractual rights of the parties, the intent of the parties is a material factor in determining whether their action comes within the statute. This we believe is a moderate statement of the law on the subject and well within the language of the courts.

The cases cited show the construction now put upon the anti-trust statute, and that this transaction is absolutely free from objection under that statute.

The sale was free from any purpose to circumvent the law. It shows that on its face. Moreover, it was of a plant, which, with the exception of the toll line, covered territory, not covered by lines of the appellant, and there was no taint of monopoly or of injurious restraint. The fact, alleged in the bill and not denied in the answer, that appellant was operating by a mere license revocable at pleasure with another company, which occupied the same local territory as the appellee company, does not alter the status of the matter. When appellant contracted to buy from appellee it must have contemplated terminating its license with the other local company, and it still has that power, thus preserving the status as to competition in that territory. The other local company, however, had no toll line from Davenport to Spokane, while appellee had, and to that extent the sale may be said to have destroyed some competition between appellant and appellee, and if that effect would vitiate the sale of the whole plant, then the contract itself provides in effect that the toll line shall not be included in the sale. But plaintiff insists that within the rule laid down by the Chief Justice in the cases referred to, the toll line may be included in the sale without violating the policy of the law.

More than that, the appellee's interstate business was dependent on a mere contract relation existing

between the predecessor in interest of appellee to which contract appellee never became a party, and certain companies doing a business from Spokane into the State of Idaho. It is sufficient to relieve the sale from embarrassment by reason of that feature to say that the appellee company did not succeed to that contract and never entered into any new contract on its own part, and that the interstate companies refused to recognize the old contract. But suppose the old contract still subsisted, it might be terminated by either party at will (subject, of course, to responsibility for damages) and either party might be relieved of it by bankruptcy, dissolution, or any one of a number of incidents. One such incident has supervened, namely, the purchase by the appellant of both of the companies with which the contract relation is said to have existed. True it is that defendant has since been compelled to sell its control of the Interstate Company, but the competition that might have existed between appellant and appellee in interstate commerce had been destroyed by appellant's own act at the time it made its contract of purchase with appellee.

But over and above all this, can it be held in reason that the owners of an intrastate plant is deprived of the power to sell its plant to a purchaser engaged in interstate business, simply because of a contract with some third person or corporation under which in certain partial and insignificant particulars, it permitted its plant to be employed in interstate business? That the Sherman Anti-trust law ever contemplated any

such result seems to us a proposition too absurd for acceptance.

Proceeding now from the general to the particular, we say that to the extent that the lines of the appellee did an interstate business, it was a mere incident of the main business too small and insignificant to be taken into account. That feature of the case could be disposed of and ought to be disposed of on the maxim, *de minimus non curat lex.* According to Mr. West's testimony the interstate business of his company for twenty-two months prior to the contract of sale averaged forty-two cents a month outgoing and seventy cents incoming, or a total of one hundred and twelve cents a month, or $13.44 per year. (Record p. 75).

That the appellant was purchasing these lines and the appellee selling, with the intention of circumventing the Anti-trust law and creating a monopoly in interstate telephone communication, is a proposition to excite the amused contempt of any one except a dishonest suitor striving to break the meshes of the law that bind him to live up to his honorable obligations.

Even in cases where the amount of interstate business is sufficient to make it of some moment, the question is not settled by that criterion alone. As was said in Anderson vs. United States, 171 U. S. 616, the transaction is not illegal "where it can be seen that the character and terms of the agreement are well calculated to attain the purpose for which it was formed, and where the effect of its formation and enforcement upon interstate trade or commerce is in any event but

indirect and incidental and not the purpose or object." Where the amount of the interstate business done is negligible, the Supreme Court of the United States has indicated that that fact alone would show the transaction to be innocuous to the law.

In United States vs. Union Pacific Railway, 226 U. S. 61, 88, the court employed this language:

> "It is urged that this competitive traffic was infinitesimal when compared with the gross amount of the business transacted by both roads, and so small as only to amount to that incidental restraint of trade which ought not to be held to be within the law; but we think the testimony amply shows that, while these roads did a great deal of business for which they did not compete, and that the competitive business was a comparatively small part of the sum total of all traffic, state and interstate, carried over them, nevertheless such competing traffic was large in volume, amounting to many millions of dollars. Before the transfer of the stock, this traffic was the subject of active competition between these systems; but by reason of the power arising from such transfer it has since been placed under a common control. It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected."

This is the case cited by appellant against the validity of the contract of sale in this case. We submit that appellant has misconceived it. It overruled the lower court because that court had measured the transaction, not by the amount of competitive business done, but by the relative proportion of that business to the non-competitive business. That criterion the court said was not the correct one. The correct one

was the amount of competitive business actually done, and if that was considerable it made no difference what proportion it bore to the other business. As the court said of the interstate business affected by the combination shown in that case, "It was by no means a negligible part, but a large and valuable part, of interstate commerce which was thus directly affected."

We also cite as authorities showing the validity of the transaction here in question:

Darius Cole Transp. Line vs. White Star Line, 186 Fed. 65.

U. S. vs. Whiting, 212 Fed. 473.

Fourth. Mr. West not authorized to make a contract.

The last proposition urged by the appellant is that Mr. West was not authorized by unanimous vote of all the stockholders to sell the property of the Davenport Independent Telephone Company and therefore that his letter to Mr. McFarland accepting the offer of the latter for the purchase of the property was without authority and void, and failed to create any contract.

Volume 3, section 670, of Cook on Corporation, is cited to the proposition that a corporation cannot sell all its property except by unanimous vote of all its stockholders. A recurrence to the text of that work, however, does not bear out the proposition. The language of Cook is that "a dissenting stockholder may prevent the sale of all the corporate property by the

directors or by a majority of the stockholders." Since the appellant is not a dissenting stockholder it does not appear to lie in its mouth to question the authority of the contract of sale, and since the appellee is in court insisting on the sale, and it does not appear that there is any stockholder objecting, a decree affirming the sale and requiring specific performance, would undoubtedly bind the appellee and all its stockholders and amply protect the appellant. The action of the appellee in this suit is the action of all its stockholders, and binds them as effectually as if they were all in court. We believe an examination of the adjudged cases will fail to show a single authority holding that a purchaser of corporate property may question the authority of the corporation to sell where the corporation, without dissent from any of its stockholders, is in court insisting on the sale.

But it is not true that there was not unanimous assent of the stockholders to the contract of sale. At a meeting held June 30, 1914, the following proceedings were had:

> "The chair submitted an offer in writing under date of May 20th, 1914, from President McFarland on behalf of the Pacific Telephone and Telegraph Company to purchase the property of this company or such portion of it as it could lawfully acquire, paying therefor the appraised value of the plant as determined by the reproduction cost new, provided the acceptance of the offer be filed with them on or before sixty days from the date thereof; Mr. Armin offered the following and moved its adoption. Resolved that the offer by President McFarland on behalf of the Pacific

> Telephone and Telegraph Company be accepted and the President is hereby directed to make formal acceptance of the same perior to the expiration of the sixty day limit, and also arrange for the appraisal in accordance with the conditions set forth in the offer. Resolution adopted by the following vote: Ayes, Armine, Cornell, West; Nays, none."
>
> Record pp. 44 and 45.

Mr. West testified with respect to this meeting: "The gentlemen named in the resolution are the Trustees. There are two others, Mrs. West and Mrs. Armine. They were seldom present. The members of the Board of Trustees own all the stock. Mr. Armine has Mrs. Armine's proxy, I have Mrs. West's." Record, p. 45.

The attorney for appellant undertook in cross examination to cast doubt on the actual holding of this meeting but without success. While it is true that the minutes of the company show that the meeting in question was a meeting of the Trustees, the three Trustees, with the wives of two of them, constituted all the stockholders of the company, and with all the stockholders thus assenting in their capacity as Trustees, no formal meeting of the stockholders was necessary. In small business corporations, where the stockholders are few and can consult together much as business partners, their assent may be gathered to any proposed course of action without formal meetings, and in such

cases any method of proof that shows the assent of all the stockholders shows the assent of the corporation.

Pacific State Bank vs. Coats, 205 Federal Reporter, 620.

Respectfully submitted,

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